

# **Exhibit 4**

**COURT REPORTERS**  
**OF AKRON CANTON AND CLEVELAND**

**Transcript of the Testimony of  
Todd Rhett Hawkins**

**Taken On:** August 20, 2008  
**Case Number:** 2:06-CV-2141-DGC

**Case:** Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

Court Reporters of Akron Canton and Cleveland  
Phone: 800-804-7787  
Fax: 330-666-9833  
Email: [reporters@courtreportersinc.com](mailto:reporters@courtreportersinc.com)  
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1 A. Personally, no.  
 2 Q. Do you know if anyone else at Midwest  
 3 Industrial Supply ever did?  
 4 A. I don't know.  
 5 Q. So if I can just kind of go back and  
 6 summarize a little bit with respect to  
 7 Exhibit 23, in the first two pages, which  
 8 constitutes essentially a letter to the Patent  
 9 and Trademark Office, correct?  
 10 A. Correct.  
 11 Q. And that letter was written because it was  
 12 the feeling of the applicant, in January of '05,  
 13 or the belief of the applicant in January of  
 14 '05, that there was an infringing device or  
 15 product actually on the market, correct?  
 16 A. Correct.  
 17 Q. And that one of those products was the  
 18 Soilworks Durasoil product?  
 19 A. Yes.  
 20 Q. For which no chemical testing or analysis  
 21 had been done by you at that point, correct?  
 22 A. I personally had not done any chemical  
 23 analysis.  
 24 Q. Are you aware of any that had been done?  
 25 **MR. SKERIOTIS:** Objection, based

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1 Durasoil product?  
 2 **MR. SKERIOTIS:** Same objection. I  
 3 mean, if, in fact, some testing was done, it  
 4 would be in anticipation of litigation. So to  
 5 the degree that your objection is -- I mean, it  
 6 clearly references "allegedly infringing  
 7 product," and should Midwest have received the  
 8 patent as these claims were drafted on page 3, I  
 9 would assume litigation would be anticipated;  
 10 and therefore, I would maintain the objection.  
 11 And if, in fact, any of your response  
 12 would be that any testing or not was done with  
 13 an attorney present, then I instruct you not to  
 14 answer that question, unless you have knowledge  
 15 prior to any attorney being involved, of any  
 16 testing done.  
 17 **THE WITNESS:** I have no knowledge  
 18 of any testing being done without the attorney  
 19 being present.  
 20 **BY MR. DOSEK:**  
 21 Q. Do you have knowledge of testing being done  
 22 with an attorney present?  
 23 **MR. SKERIOTIS:** Objection.  
 24 Instruct you not to answer. Same objection.  
 25 **MR. DOSEK:** And you are

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1 upon -- same objection I lodged in the prior  
 2 depositions, that with respect to any testing  
 3 that's been done pursuant to an attorney or not,  
 4 we maintain the attorney work product.  
 5 If there was any testing done prior  
 6 to any attorney being involved and prior to this  
 7 litigation, you are free to answer that  
 8 question.

9 **MR. DOSEK:** I don't think there  
 10 is any work product in January of '05, John.

11 **MR. SKERIOTIS:** You didn't limit it  
 12 to January '05.

13 **MR. DOSEK:** Well, January '05  
 14 is the time that this exhibit was prepared,  
 15 Exhibit 23.

16 **THE WITNESS:** I am thoroughly  
 17 confused now.

18 **BY MR. DOSEK:**

19 Q. Okay.

20 A. If you would re --

21 Q. Fine, we will back up.

22 As of January '05, are you aware of any  
 23 chemical analysis or any other kind of analysis  
 24 that had been performed by or on behalf of  
 25 Midwest Industrial Supply with respect to the

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1 claiming that whether or not he knows whether  
 2 there was any testing done by any lawyer is  
 3 privileged?  
 4 **MR. SKERIOTIS:** Yes. It's attorney  
 5 work product, absolutely. Because then you  
 6 would know whether or not any testing was done.  
 7 And that whether or not any attorney did any  
 8 testing on any product pursuant to this  
 9 litigation in anticipation thereof is absolutely  
 10 privileged.

11 **MR. DOSEK:** And you're --

12 **MR. SKERIOTIS:** And that's the same  
 13 objection, Scott, I've noted in the Detloff  
 14 deposition and the Vitale deposition as well,  
 15 and I have never been questioned until today.  
 16 So --

17 **MR. DOSEK:** Well, just because  
 18 you haven't been questioned doesn't mean that  
 19 your objection is not ill founded, because it  
 20 is, John, particularly when you are talking  
 21 about something that is in the time frame of  
 22 January of '05, a year and a half before any of  
 23 the -- before the patent was issued, before any  
 24 of this --

25 **MR. SKERIOTIS:** Sure.

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1       **MR. DOSEK:** -- controversy ever  
2   arose.

3       **MR. SKERIOTIS:** You are absolutely  
4   true.

5       **MR. DOSEK:** That is akin to an  
6   insurance company claiming work product whenever  
7   it drafts an insurance policy, because there may  
8   be litigation about the insurance policy.

9       And, John, you know as well as I do  
10   that the attorney work product doctrine does not  
11   extend that far.

12      **MR. SKERIOTIS:** And I think we  
13   disagree with respect to patent cases,  
14   especially where you've got a document, Scott,  
15   that says that they believe that there is a  
16   product that is being infringed. How that's not  
17   in anticipation of litigation is beyond question  
18   to me.

19      So I am maintaining the objection and  
20   you are welcome to disagree with it.

21      **MR. DOSEK:** All right. Just so  
22   I am clear then, you are saying that this, in  
23   January of '05, constitutes something that is in  
24   anticipation of litigation, even though you  
25   filed, in your motion to dismiss this lawsuit,

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1   knows whether any such testing has been done is  
2   privileged and work product?

3       **MR. SKERIOTIS:** If an attorney was  
4   present, correct. You can ask him that  
5   question, if an attorney wasn't present, if it  
6   was done, yeah. That's exactly what I am  
7   saying.

8       **BY MR. DOSEK:**

9       **Q.** The question was, are you aware of any  
10   testing that's been done, chemical testing of  
11   the Durasoil product, by anybody?

12      **MR. SKERIOTIS:** Same objection.

13      **THE WITNESS:** Same answer. Not  
14   without the attorney present.

15       **BY MR. DOSEK:**

16       **Q.** So you are aware of testing of the Durasoil  
17   product that was done under the supervision of  
18   lawyers; is that correct?

19      **MR. SKERIOTIS:** Objection. Again,  
20   he already asked and answered this question  
21   already. So, I mean, to the degree you got your  
22   answer, you got your answer. Let's move on.  
23   You are just asking the same question a  
24   different way.

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1   an argument that your letters to Polar Supply in  
2   the summer of '06 did not constitute threats of  
3   litigation, is that what you are saying?

4       **MR. SKERIOTIS:** That's exactly what  
5   I am saying, with one caveat.

6       **MR. DOSEK:** Okay.

7       **MR. SKERIOTIS:** If you would take a  
8   look, Scott, at page 3, the claim at issue is "A  
9   compound for chemical soil stabilization and  
10   dust control, the compound comprising: a  
11   synthetic isoalkane," period. If that claim  
12   were to have issued, that is exactly my  
13   position.

14       **BY MR. DOSEK:**

15       **Q.** Are you aware of any chemical analysis or  
16   testing that has been done with respect to the  
17   Durasoil product?

18      **MR. SKERIOTIS:** Same objection.  
19   Other than if an attorney was working on it --

20      **THE WITNESS:** Same answer as I  
21   gave before.

22      **MR. DOSEK:** And you are saying,  
23   John, that whether he knows if any such testing  
24   has even been done -- I am not asking him for  
25   the results of any such testing -- whether he

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1       **BY MR. DOSEK:**

2       **Q.** You are not aware of any testing of the  
3   Durasoil product that's ever been done by the  
4   Corps of Engineers?

5       **A.** Yes, I am aware of testing that was done to  
6   the Durasoil product through the Corps of  
7   Engineers. Chemical testing, no.

8       **Q.** What kind of testing are you referring to?

9       **A.** They were involved -- Durasoil was a  
10   product that was tested at Yuma, Arizona the  
11   following year that -- my previous reference.

12       **Q.** Is it fair to characterize that testing at  
13   Yuma as performance testing?

14       **A.** Yes.

15       **Q.** As opposed to chemical analysis?

16       **A.** Yes.

17       (Thereupon, Plaintiff's Exhibit 10 of  
18   the T.R. Hawkins deposition was  
19   marked for purposes of  
20   identification.)

21       **THE WITNESS:** Can I take a  
22   lavatory break here real quick?

23       **MR. DOSEK:** You bet. You bet.

24       **THE VIDEOGRAPHER:** We're off the  
25   record.